IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.694 OF 2005

Kailashkumar Virbahadur Agri
and others ... Petitioners

versus

The State of Maharashtra ... Respondent

...

Mr.Murtaza Nazami with Miss M.U. Inamdar, for the Petitioners.

Mr.V.B. Konde Deshmukh, A.P.P., for the Respondent.

...

CORAM : A.M.KHANWILKAR,J.

15th March 2005

P.C.:

. Heard Counsel for the parties. Rule. Rule made returnable forthwith by consent. Mr. Konde Deshmukh, A.P.P., waives notice for the Respondent. As short point is involved, petition is taken up for final disposal forthwith by

consent.

2. This petition takes exception to the order passed by the Additional Sessions Judge, Greater Mumbai, dated 23rd February 2005 below Miscellaneous Application No. 197/2005 in Sessions Case No. 1088/2001. By the said order, the trial Court rejected the application preferred by the Petitioners for recall of witnesses on the ground that the earlier Advocate, who was espousing the cause of the Petitioners-accused has not cross-examined the concerned witnesses on several material points. The application has been rejected on the reasoning that change of Advocate cannot be ground to recall witnesses for further cross-examination, who have been already cross-examined thoroughly by the earlier appointed Advocate. Besides, it is noted that the application as filed on behalf of the Petitioners was vague.

3. Having considered the rival submissions and going through the record of the case, I am inclined to allow this petition to the limited

extent as pressed on behalf of the Petitioners that witnesses, P.W.No.1 and P.W.No. 4 alone be recalled because they are the material witnesses and on scrutiny of the cross-examination conducted by the earlier appointed Advocate, it appears that all aspects have not been touched upon in the cross-examination as conducted. This peculiar course is adopted in view of the fact that the Petitioners are facing charge of serious crime of having committed 8 murders and are represented by State appointed Advocate. Mistake of the earlier Advocate cannot be the ground to deny just trial to the Petitioners, who have been arraigned as accused in the said case. As mentioned earlier, there is substance in the grievance of the Petitioners that the nature of cross-examination conducted by the earlier Advocate of these witnesses (P.W.1 and P.W.4) is not effective on material points. Although it is possible to accept the opinion recorded by the lower Court that the application as filed by the Petitioners was vague and change of Advocate by itself cannot be the ground for recall of witnesses for further cross-examination, however, to do substantial justice to the parties and for

just decision of the case, in my opinion, it is imperative to allow the application filed by the Petitioners but restricted to P.W.No.1 and P.W.No.4, as is pressed before this Court on the assurance by the Petitioners that they will not ask for any adjournment in the event the said witnesses appear pursuant to the summons sent by the trial Court, nor indulge in any such measure so as to protract the proceedings.

4. In view of the aforesaid assurance given by the Petitioners and in the interest of justice, the order in question is set aside and the application filed by the Petitioners is allowed only to the limited extent of recalling P.W.No.1 and P.W.No.4 for purpose of further cross-examination.

5. At this stage, Counsel for the Petitioners submits that till P.W.No.1 and P.W.No.4 are made available for further cross-examination, recording of evidence of the investigating officer be deferred. If such application is preferred before the trial Court, there is no doubt that the appropriate directions

will be passed by the trial Court in that behalf as may be warranted on the basis of record which is before it.

(A.M.KHANWILKAR,J.)